LOW YIN KOW

v.

TOR LEN HUA & ORS

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CIVIL SUIT NO: 22-58-02]
29 APRIL 2002

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Principles applicable - Whether conditions satisfied - Whether injunction could be granted to restrain execution of a judgment obtained in another action - Whether an abuse of process*

CIVIL PROCEDURE: *Jurisdiction - High Court - Whether one High Court had jurisdiction to set aside a final decision of another High Court - Whether relevant and valid grounds submitted for such setting aside - Whether proceedings an abuse of process*

This was an application by the plaintiff for an interlocutory injunction to restrain the lawful execution of a judgment to deliver vacant possession of certain land ('the land') to the first and second defendants ('the defendants'), contending that the partition of the land by the High Court of Muar in an earlier judgment was null and void. The plaintiff, however, did not challenge the propriety or legality of the later judgment obtained by the defendants.

Held:

[1] The plaintiff had not shown that: (1) the intended execution of the judgment would infringe his legal rights; (2) he had a reasonable cause of action; (3) there was a serious issue to be tried; or (4) that he had a good arguable claim to the right he sought to protect. In the first place, it was beyond doubt that the defendants had the right conferred by a valid and subsisting judgment to enforce the judgment. Hence, this was not an application for an interlocutory injunction to restrain the defendants from doing an act alleged to be a violation of the plaintiff's legal right, but to restrain them from exercising their right to enforce the judgment. This application was a misuse of the court machinery and was an abuse of process. (pp 253 d-e & 254 b-c)

[2] The plaintiff's contention that the partition was null and void should have been brought up at the High Court of Muar in the earlier proceeding instead of the present application. It was an abuse of process by the

plaintiff to initiate proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision which was made by another court of competent jurisdiction in previous proceedings in which the plaintiff had had a full opportunity of contesting the decision of the court by which it was made. Re-litigation of an issue which had previously been the subject of a final decision was *prima facie* an abuse of the privilege of the court. (pp 255 c-g & 256 a)

[3] Furthermore, the purity of purpose was suspect as well, for it certainly appeared that the action was for a collateral purpose on the part of the plaintiff rather that the pursuit of his remedy at law; this was not a *bona fide* application for protection. The established facts and circumstances show that this application had no merits, but was for the purpose of denying the defendants the hard-won fruits of their litigation. (pp 256 b & 259 b)

[Application dismissed.]

Case(s) referred to:

Abdul Ghapur Hj Salleh v. Tun Datuk Hj Mohamed Adnan Robert Yang Di-Pertua Negeri Sabah & Ors [1987] 2 MLJ 724 ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 ***(refd)***

American Cyanamid Co v. Ethicon [1975] 1 All ER 504 ***(refd)***

Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd [1998] 6 MLJ 136 ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(foll)***

Bidang Cerdas Sdn Bhd v. Sayfol Management Sdn Bhd [1998] 2 CLJ Supp 7 ***(refd)***

Birmingham Estates Company v. Smith 13 Ch D 506 ***(refd)***

Blakey v. Latham [1890] 43 Ch D 23 ***(refd)***

Bozson v. Altrincham Urban District Council [1903] 1 KB 547 ***(refd)***

Bryanston Finance Ltd v. De Vries (No 2) [1976] 1 All ER 25 ***(refd)***

Business Software Alliance & Ors v. SM Summit Holdings Ltd & Anor and Other Appeals [2000] 2 SLR 733 ***(refd)***

Cambridge Nutrition Ltd v. British Broadcasting Corp [1990] 3 All ER 523 ***(refd)***

Carl Zeiss Stiftung v. Rayner & Keeler Ltd & Ors [1976] 1 AC 853 ***(refd)***

Cathay Theatres Pte Ltd v. LKM Investment Holdings Pte Ltd [2000] 1 SLR 701 ***(refd)***

Cedar Trading Sdn Bhd v. Dong Ah Construction Industrial Co Ltd [1999] 5 MLJ 65 ***(refd)***

Chang Kow Chin v. Kammala S Kumarasamy [2000] 2 CLJ 167 ***(refd)***

Cheong Kong Enterprise Company Sdn Bhd v. Foong-Seong Mines Ltd & Ors [1969] 2 MLJ 246 ***(refd)***

Coflexip SA and Anor v. Stolt Comex Seaway MS Ltd And Ors [1999] 1 All ER 593 ***(refd)***

Concorde Construction Co Ltd v. Colgan Co Ltd 29 Build LR 120 ***(refd)***

Credit Agricole Indosuez v. Banque Nationale De Paris (No 2) [2001] 2 SLR 301 ***(refd)***
Datuk Syed Kechik Syed Mohamed v. Datuk Yeh Pao Tzu & Ors [1977] 1 MLJ 56 ***(refd)***
Dr Kok Chee Min v. Kan Choy Yoong & Ors [1994] 3 MLJ 210 ***(refd)***
Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
Eren v. Tranmae (Court of Appeal (Civil Division) 17 March 1994 (Unreported) ***(foll)***
Evercrisp Snack Products (M) Sdn Bhd v. Sweeties Food Industries Sdn Bhd [1980] 2 MLJ 297 ***(refd)***
Ferdinand Wagner v. Laubscher Bros & Co [1970] 2 QB 313 ***(refd)***
Fulcrum Capital Sdn Bhd v. Dato' Samsudin Abu Hassan & Ors [2001] 5 CLJ 73 ***(refd)***
Harkness v. Bells Asbestos and Engineering Ltd [1967] 2 QB 729 ***(refd)***
Harris Mohd Salleh v. The Returning Officer, Ismail Hj Majin & Ors And Another Action (No 2) [2001] 6 MLJ 610 ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 ***(refd)***
Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***
Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 ***(refd)***
Hubbard And Ors v. Pitt And Ors [1976] QB 142 ***(refd)***
Hunter v. Chief Constable of the West Midlands Police [1982] AC 529 ***(refd)***
ICI Australia Operations Pty Ltd v. Trade Practices Commission 110 ALR 47 ***(refd)***
In Re London Cotton Company 2 Eq 53 ***(refd)***
In Re Riddell [1888] 20 QBD 513 ***(refd)***
In Re Thorpe ex p Hartel 8 Ch D 743 ***(refd)***
JKR Leonard v. The Official Assignee [1941] MLJ 30 ***(refd)***
Kanawagi Seperumaniam v. Penang Port Authority [2001] 5 MLJ 433 ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 ***(refd)***
Koperasi Serbaguna Taiping Barat Bhd v. Lim Joo Thong [1998] MLJU 215 ***(refd)***
Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 ***(refd)***
Kunathasan Chelliah & Anor v. Tan Yak Buang & Ors [1996] MLJU 528 ***(refd)***
Lee Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor [2000] 3 CLJ 473 ***(refd)***
Lian Soon Construction Pte Ltd v. Guan Qian Realty Pte Ltd [1999] 2 SLR 233 ***(refd)***
Liew Ah Hock v. Malayan Railway [1967] 1 MLJ 53 ***(foll)***
Lim Chong Construction Co Sdn Bhd v. Silam Quarry Sdn Bhd [1990] 1 CLJ 1158; [1990] 2 CLJ (Rep) 374 ***(refd)***
Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 ***(refd)***
Lim Kit Siang v. United Engineers (M) Bhd & Ors [1988] 1 MLJ 35 ***(refd)***
Lim Kok Liam & Sons Sdn Bhd v. Lau Choon Wan t/a Restoran Paramount Garden and Third Party [1996] 4 CLJ 256 ***(refd)***
Maastricht Referendum Campaign v. Hounan and Ors (Chancery Division 28 May 1993) (Unreported) ***(refd)***
Majlis Perbandaran Pulau Pinang v. Boey Siew Than & Ors [1979] 2 MLJ 127 ***(refd)***
Malayan Banking Bhd v. Syarikat Seri Belian Sdn Bhd [1997] 4 CLJ Supp 154 ***(refd)***

Malayan United Finance Bhd v. Sun Chong Construction Sdn Bhd & Ors [1995] 4 MLJ 741 ***(refd)***
McIkenny v. Chief Constable of the West Midlands [1980] QB 283 ***(refd)***
Microsoft Corporation v. Plato Technology Ltd Court of Appeal (Civil Division) (Unreported) ***(refd)***
Mitchell and Another v. Carter and another, Buckingham International Plc [1977] 1 BCLC 673 ***(refd)***
Mohamed Zainuddin Puteh v. Yap Chee Seng [1978] 1 MLJ 40 ***(refd)***
Mokhtar Amin v. Omar Mat [1999] 1 CLJ 119 ***(refd)***
Mothercare Ltd v. Robson Books Ltd [1979] FSR 466 ***(refd)***
Muar Hup Seng Tapioca Sdn Bhd v. Perbadanan Kemajuan Ekonomi Negeri Johor [1995] MLJU 313 ***(refd)***
New England Reinsurrance Corporation and First State Insurance Co v. Messoghios Insurance Co SA [1992] 2 Lloyd's Rep 251 ***(refd)***
Ong Seng Kee v. Lee Soon Fatt [1994] 2 CLJ 790 ***(refd)***
Ooi Bee Tat v. Ooi Bee Tat & Sons Sdn Bhd & Anor [1999] 5 MLJ 10 ***(refd)***
P'ng Sai Choo & Ors v. Saw Keng See & Anor [1996] MLJU 263 ***(refd)***
Paramount Assurance Sdn Bhd lwn. Intact-Pro Sdn Bhd & Satu Lagi [1995] MLJU 290 ***(refd)***
Perumahan Farlim (PG) Sdn Bhd & Ors v. Cheng Han Guan & Ors [1989] 2 CLJ 967; [1989] 1 CLJ (Rep) 127 ***(refd)***
Perwira Affin Bank Bhd v. Hj Zakaria Hj Ismail & Ors [1998] 2 CLJ 770 ***(refd)***
Poh Soon Kiat v. Hotel Ramada of Nevada t/a Tropicana Resort & Casino [1999] 4 SLR 391 ***(refd)***
Ratnam v. Cumarasamy [1969] MLJ 330 ***(refd)***
RCA Sdn Bhd v Pekerja-perkerja RCA Sdn Bhd & Ors [1991] 1 CLJ 19; [1991] 1 CLJ (Rep) 401 ***(refd)***
Reg v. Secretary of State for Transport, ex parte Factortame Ltd [1990] 2 AC 85 ***(refd)***
Regina v. Secretary Of State For Transport ex parte Factortame Ltd And Ors (No 2) [1991] 1 AC 603 ***(refd)***
Regina v. Secretary of State for Transport., ex parte Factortame Ltd And Ors (No 2) [1991] 1 AC 603 ***(refd)***
Reichel v. Magrath [1889] 14 App Cas 665 ***(refd)***
Sarkawi Sadijo v. BMG Music (M) Sdn Bhd & Ors [1996] 4 MLJ 515 ***(refd)***
Sarwari Ainuddin v. Abdul Aziz Ainuddin [2000] 5 MLJ 391 ***(refd)***
Saw Seng Kee v. Director of Lands & Mines, Penang & Ors [1987] 1 MLJ 80 ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(refd)***
Seet Soh Ngoh v. Venkateswara Sdn Bhd & Anor [1976] 1 MLJ 242 ***(refd)***
Serangoon Estate v. Ang Keng [1953] 19 MLJ 116 ***(refd)***
Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd [1985] 1 MLJ 132 ***(refd)***
Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 ***(refd)***
Smith v. Inner London Education Authority [1978] 1 All ER 411 ***(refd)***

Speed Seal Products Ltd v. Paddington and Anor [1985] 1 WLR 1327 ***(refd)***
Strandmill Ltd v. Epping Forest District Council (Court of Appeal (Civil Division) 6 July 1989) (Unreported) ***(foll)***
Stratford v. Lindley [1965] AC 269 ***(refd)***
Sungai Way Leasing Sdn Bhd v. Kim Leong Timber Sdn Bhd and Ors [1990] 1 CLJ 148; [1990] 3 CLJ (Rep) 131 ***(refd)***
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(refd)***
Syarikat Palaykat Madras v. Asgar Ali Fakhruddin Kagdi [1998] MLJU 535 ***(refd)***
Tai Choi Yu v. RR Sethu & Anor [2001] 6 CLJ 60 ***(refd)***
Talbot v. Berkshire County Council [1994] QB 290 ***(refd)***
Tam Seek Hong v. Majlis Amanah Rakyat (MARA) [1994] 3 CLJ 64 ***(refd)***
Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1983] l MLJ 323 ***(refd)***
The Governors & Trustees of Lady Templar Tuberculosis Hospital Fund Registered v. Rampai Muda Development Sdn Bhd [1987] 2 MLJ 494 ***(refd)***
Tien Ik Sdn Bhd v. Kuok Khoon Hwong Peter [1992] 2 MLJ 689 ***(refd)***
Tneoh Hong Seng v. Dayani Sdn Bhd [1998] 2 CLJ Supp 79 ***(refd)***
Tribune Investment Trust Inc v. Soosan Trading Co Ltd [2000] 3 SLR 405 ***(refd)***
Tsen Kyun Tshin v. Lee Tse Khiong [1998] 3 CLJ 148 ***(refd)***
United Diamond Peak Sdn Bhd [1999] 6 MLJ 321 ***(refd)***
Utusan Melayu (Malaysia) Berhad & Anor v. Chan Tse Yuen [1989] 1 CLJ 149; [1989] 1 CLJ (Rep) 163 ***(refd)***
Wong Hai Ong v. Banque Nationale De Paris [2000] 6 CLJ 92 ***(refd)***
Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 2 MLJ 240 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 47 r. 1(1)(a)

Foreign Judgments (Reciprocal Enforcement) Act 1933 [UK], s. 2(2)

For the plaintiff - Mohd Ashri Rais; M/s Mohd Ashri Rais & Co
For the defendants - Tan Kok Kwang; M/s Tan Kok Kwang & Co

Reported by Suresh Nathan

JUDGMENT

Jeffrey Tan J:
This is an application (encl. 4 dated 26 April 2002) by the plaintiff for the following injunction.

> Bahawa Defendan-Defendan dan/atau wakil atau pengkhidmatnya ditegah dan dilarang daripada merobohkan premis kedai Plaintiff di atas tanah pegangan GM 905 Lot 10767 Mukim Sri Gading, Batu Pahat dikenali sebagai LC 98, Jalan Besar, Parit Raja, Batu Pahat, Johor bagi menguatkuasakan Writ Pemilikan Mahkamah Magistret Batu Pahat Saman No. 72-856-1995 sehingga guaman ini diputuskan sepenuhnya oleh Mahkamah.

In truth, this is an application by the losing party in Batu Pahat Magistrate's Court Summons No. 72-856-1995 to restrain lawful execution upon the

judgment obtained by the 1st and 2nd defendants, who were the plaintiffs in Batu Pahat Magistrate's Court Summons No. 72-856-1995.

The pertinent facts, all admitted by the plaintiff in his affidavit affirmed on 24 April 2002, are as follows; (i) on 4 May 2000, after a full trial, the Batu Pahat Magistrate's Court in Summons No. 72-856-1995 ordered the plaintiff to deliver vacant possession of that portion of Lot 10768 Mukim Sri Gading, Batu Pahat occupied by the plaintiff to the 1st and 2nd defendants, (ii) the plaintiff appealed to the High Court, *vide* Muar Civil Appeal 11-20-2001, (iii) on 12 November 2001, that appeal was dismissed with costs by the High Court, (iv) the plaintiff applied for leave to appeal against the order of the High Court, and, (v) on 16 April 2002, that application for leave to appeal was dismissed by the Court of Appeal.

Need it be said, that upon refusal of leave to appeal, the litigation between the parties in 72-856-1995 had reached an end (see *Ratnam v. Cumarasamy* [1969] MLJ 330 at 333, where Good JA stated: "In the present case our order refusing an extension of time for the appellant to file the record of appeal put an end to the proceedings and applying Lord Alverstone's test finally disposed of the rights of the parties by barring the unsuccessful plaintiff from appealing against the order of the High Court). The issues in 72-856-1995 had run the full course. The rights and status of the parties had been determined (see *Blakey v. Latham* [1890] 43 Ch D 23, 24). There was a final and conclusive adjudication of the matters in controversy in 72-856-1995 (see *In Re Riddell* [1888] 20 QBD 513, 517; see also *Cheong Kong Enterprise Company Sdn Bhd v. Foong-Seong Mines Ltd & Ors* [1969] 2 MLJ 246), and there could be no question that the judgment of the Batu Pahat Magistrate's Court, which undoubtedly satisfies the test advanced by Lord Alverstone CJ in *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547 and which judgment may not be varied (see *JKR Leonard v. The Official Assignee* [1941] MLJ 30), is conclusive against the plaintiff. Incidentally, it was the finding of the Batu Pahat Magistrate's Court that the shophouse of the plaintiff was occupying a portion of the 1st and 2nd defendants' land – "amatlah jelas bahawa kedai yang diduduki oleh defendan telah memasuki sebahagian tanah milik plaintif ..." (see encl. 4 exh. "LY4"), and as said it was the order of the Batu Pahat Magistrate's Court that the plaintiff do deliver vacant possession of that portion of Lot 10768 Mukim Sri Gading, Batu Pahat occupied by the plaintiff to the 1st and 2nd defendants.

Meanwhile, to enforce the judgment in their favour, the 1st and 2nd defendants had applied, *vide* Batu Pahat Magistrate's Court application for execution No. 76-65-2001 dated 21 September 2001, for a writ of possession, and the

Batu Pahat Magistrate's Court by order dated 6 February 2002 had authorised the 1st and 2nd defendants and or the bailiff of the court to use such force as may be reasonably necessary to enter and to demolish that part of the shophouse of the plaintiff standing on the land of the 1st and 2nd defendants (see encl. 4 exh. "LY3"). Indeed, the then pending application for leave to appeal was no impediment to the enforcement of the judgment, for it is most settled law that a court should not deprive a litigant of the fruits of his litigation until the appeal is determined (*Sungai Way Leasing Sdn Bhd v. Kim Leong Timber Sdn Bhd and Ors* [1990] 1 CLJ 148; [1990] 3 CLJ (Rep) 131; *Credit Agricole Indosuez v. Banque Nationale De Paris (No 2)* [2001] 2 SLR 301; *Fulcrum Capital Sdn Bhd v. Dato' Samsudin Abu Hassan & Ors* [2001] 5 CLJ 73; *Wong Hai Ong v. Banque Nationale De Paris* [2000] 6 CLJ 92: *Tsen Kyun Tshin v. Lee Tse Khiong* [1998] 3 CLJ 148; *Bidang Cerdas Sdn Bhd v. Sayfol Management Sdn Bhd* [1998] 2 CLJ Supp 7; *Chang Kow Chin v. Kammala S Kumarasamy* [2000] 2 CLJ 167), unless the unsuccessful party can show special circumstances to justify it (*Perwira Affin Bank Bhd v. Hj Zakaria Hj Ismail & Ors* [1998] 2 CLJ 770; *Tneoh Hong Seng @ Teoh Hong Seng v. Dayani Sdn Bhd* [1998] 2 CLJ Supp 79; *Malayan Banking Bhd v. Syarikat Seri Belian Sdn Bhd* [1997] 4 CLJ Supp 154; *Lim Kok Liam & Sons Sdn Bhd v. Lau Choon Wan t/a Restoran Paramount Garden and Third Party* [1996] 4 CLJ 256; *P'ng Sai Choo & Ors v. Saw Keng See & Anor* [1996] MLJU 263; *Paramount Assurance Sdn Bhd lwn. Intact-Pro Sdn Bhd & Satu Lagi* [1995] MLJU 290; *Muar Hup Seng Tapioca Sdn Bhd v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1995] MLJU 313; *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406; *Tam Seek Hong v. Majlis Amanah Rakyat (MARA)* [1994] 3 CLJ 64, *Ong Seng Kee v. Lee Soon Fatt* [1994] 2 CLJ 790; *Dr Kok Chee Min v. Kan Choy Yoong & Ors* [1994] 3 MLJ 210; *Harris Mohd Salleh v. The Returning Officer, Ismail Hj Majin & Ors And Another Action (No 2)* [2001] 6 MLJ 610; *Sarwari Ainuddin v. Abdul Aziz Ainuddin* [2000] 5 MLJ 391; see O. 47 r. 1(1)(a) of the Rules of the High Court 1980, and *Serangoon Estate v. Ang Keng* [1953] 19 MLJ 116), or if an appeal would be rendered nugatory without the stay or other interim preservation order (*See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299). " ... as a general proposition, the court does not deprive a successful litigant of the fruits of his litigation" (*Cathay Theatres Pte Ltd v. LKM Investment Holdings Pte Ltd* [2000] 1 SLR 701 per Rajendran J). "However, when a party is exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory ..." (*Lian Soon Construction Pte Ltd v. Guan Qian Realty Pte Ltd* [1999] 2 SLR 233 per Karthigesu JA.). But that is all academic in the present case, for given that leave to appeal had been refused, there is no possibility of any stay of execution pending appeal and also no possibility that the 1st and 2nd defendants who had properly obtained their judgment would be deprived of the fruits of their litigation.

The 1st and 2nd defendants could be deprived of the fruits of their litigation if the judgment given in their favour is set aside. But to set aside the judgment it must first be proved that the judgment was null and void on the ground of illegality or lack of jurisdiction. The foremost local authority on this point is *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, where it was held by the Federal Court that one High Court may exercise judicially its inherent jurisdiction to set aside a final judgment of another High Court, where that final judgment was proved to be null and void on ground of illegality or lack of jurisdiction. In *Badiaddin*, the appellants were the registered co-proprietors of a piece of Malay reservation land that was charged to the respondent as security for an advance to a third party. Upon breach of the loan agreement, the respondent obtained an order for sale of the said land. The appellant then applied for a declaration that the charge as well as the order for sale were invalid as being in contravention of the Malay Reservations Enactment (FMS Cap 142). On 21 March 1988, the High Court granted the declaration and upon the respondent's application ordered the appellant to repay all monies lent; there was no appeal against that order. On 8 October 1990, the High Court granted a further order declaring that the appellant had received an advantage and ordered the sale of the said land; the appeal against that order was struck out. The appellant commenced proceedings afresh to have the order of 8 October 1990 declared null and void and to have it set aside on the ground that it contravened the Malay Reservation Enactment. The appellant argued that they were entitled to the remedy *ex debito justitiae* without the need to comply with the appeal procedure. The respondent argued that *res judicata* and estoppel precluded the appellant from questioning the validity of the order of 8 October 1990. Mohd Noor Abdullah J held that it would be unjust to estop the appellants from challenging the order of 8 October 1990 by reference to *res judicata* or to any other branch of the doctrine of estoppel, as the order of 8 October 1990 was plainly invalid. On appeal, the Court of Appeal held that the High Court was *functus officio* and had no jurisdiction whatsoever to set aside the order of 8 October 1990, regardless of any illegality in the order.

However, it was held by the Federal Court in allowing the appeal and restoring the order of Mohd Noor Abdullah J, that the High Court has the necessary inherent jurisdiction quite unaffected by the doctrine of *functus officio* to set aside a final judgment of another High Court that could be proved to be null and void on ground of illegality or lack of jurisdiction and that a person affected by the order is entitled to apply to have the order set aside without the need to have any recourse to the rules that deal expressly with proceedings to set aside orders for irregularity.

At pp. 92-93, Mohd Azmi FCJ (with him Eusoff Chin CJ Federal Court and Wan Adnan FCJ, as he then was) propounded the special exception to the rule that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction, as follows:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of irregularity or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and to give to the judge a discretion as to the order he will make'.
>
> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37 at p. 39 provides the correct guideline on the subject:
>
> > The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock (now a Law Lord) said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or going to the court and asking for it to be set aside'.
>
> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category

> of cases involving orders which contravened 'any written law', the contravention should be one which (defies) a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

Gopal Sri Ram JCA as well held that an order of a court of unlimited jurisdiction made without jurisdiction may be declared void and set aside, and that a court of unlimited jurisdiction, even in the absence of an express enabling jurisdiction, has inherent power to set aside its orders made in breach of written law.

> If as held ... there is no power in a court to set aside its orders, though made in contravention of the express provisions of a statute, then, I must fold my arms in abject submission, allow the orders to stand and let the illegality persist. But I do not perceive the law to intend such a result. It is true as a general rule, that orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed ... .
>
> It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may made orders in breach of written law ... . I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

Hitherto, in *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104, where the High Court reopened its earlier procedural ruling, heard arguments afresh and reversed its earlier ruling, and where it was argued on appeal that it was well within the powers of the judge to alter the judgment at any time before it was entered and perfected, Gopal Sri Ram JCA had stated the circumstances under which a court may amend or alter its own order.

> ... once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened nilly-willy. One may then ask: how is this approach to be reconciled with the decision in *Harrison*? The answer to that question lies in recognising that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests.

Therefore, it is the law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction (*Hock Hua Bank Bhd v. Sahari Murid* [1981] 1 MLJ 143). Except that a person affected by an order which could be proved to be null and void on ground of irregularity or lack of jurisdiction (*Badaiddin*, since followed in *Koperasi Serbaguna Taiping Barat Bhd v. Lim Joo Thong* [1998] MLJU 215, *Tai Choi Yu v. RR Sethu & Anor* [2001] 6 CLJ 60, *Syarikat Palaykat Madras v. Asgar Ali Fakhruddin Kagdi* [1998] 535 MLJU 1, *Mokhtar Amin v. Omar Mat @ Mohd Ziki* [1999] 1 CLJ 119, *United Diamond Peak Sdn Bhd* [1999] 6 MLJ 321, *Cedar Trading Sdn Bhd v. Dong Ah Construction Industrial Co Ltd* [1999] 5 MLJ 65, *Ooi Bee Tat @ Ooi Bee Lee v. Ooi Bee Tat & Sons Sdn Bhd & Anor* [1999] 5 MLJ 10; see however *Poh Soon Kiat v. Hotel Ramada of Nevada t/a Tropicana Resort & Casino* [1999] 4 SLR 391, where it was held by the High Court of Singapore that *Badaiddin* was wrongly decided) is entitled to apply to have set aside *ex debito justitiae* without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity. The courts have not closed the door to the type of defects in the final judgment that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure. The general rule is that the order must be a nullity. Apart from a breach of rules of natural justice, the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not be applied to a defect in a final order which has contravened a procedural requirement of any written law (*Badaiddin*; see also *Harkness v. Bells Asbestos and Engineering Ltd* [1967] 2 QB 729, 736). "... an irregularity ... is not a ground for setting aside the judgment" (*Malayan United Finance Bhd v. Sun Chong Construction Sdn Bhd & Ors* [1995] 4 MLJ 741). The discretion to invoke the inherent jurisdiction should be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. Otherwise, once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to, so there is certainty and finality to judgments and orders, and may only be reopened if it is demonstrated that the court plainly lacked

jurisdiction to make the order complained of and provided that the order in question has not been drawn up and perfected. In all other cases, the normal appeal procedure should be adopted to set aside a defective order.

The appeal procedure was adopted by the plaintiff. Just that his appeal to the High Court, and his application for leave to appeal to the Court of Appeal were unsuccessful. But it would seem that the plaintiff would not accept the result, for by the present action filed after he had exhausted the appeal process, the plaintiff seeks to nullify the conclusive judgment obtained by the 1st and 2nd defendants in 72-856-1995. And by an injunction restraining the 1st and 2nd defendants from demolishing that portion of his shophouse occupying the 1st and 2nd defendants' land in execution upon the judgment, the plaintiff seeks to stay lawful execution of the judgment.

As said, to nullify the judgment, it must first be proved that the judgment was null and void on the ground of illegality or lack of jurisdiction. So to begin with, the plaintiff ought at the very least contend that the judgment obtained by the 1st and 2nd defendants was null and void on the ground of illegality or lack of jurisdiction. But what the plaintiff contends in his statement of claim filed herein is, that the partition in 1978 of land known as MG 127 Lot 813 Mukim Sri Gading into 3 lots (namely, Lot 10767 belonging to the plaintiff, Lot 10768 belonging to the 1st and 2nd defendants, and Lot 10769 belonging to a third party) was null and void. According to the statement of claim, (i) the plaintiff had a 1672/31200 undivided share of MG 127 Lot 813 Mukim Sri Gading, (ii) on 22 April 1978, on the application of the 1st and 2nd defendants and that third party, the High Court at Muar ordered the partition of MG 127 Lot 813 Mukim Sri Gading into lots A, B & C, (iii) on 9 July 1986, three individual titles (meaning to Lots 10767, 10768, 10769) were issued, (iv) the 1st and 2nd defendants further subdivided lot 10768 into 20 separate building lots, (v) the approved layout plan earmarked a 50 feet wide road running along the boundary separating Lot 10767 and Lot 10768, (vi) to save his shophouse and the premises of others from demolition, the plaintiff appealed to the approving authorities to reduce the width of the road to 40', (vii) on 1 April 2002, the approving authorities agreed to reduce the width of the road to 40', (viii) the 1st and 2nd defendants would not agree to the reduction of the width of the road, (ix) the 1st and 2nd defendants are set on demolishing the shophouse of the plaintiff, (ix) the 1st and 2nd defendants could not demolish the shophouse of the plaintiff, as the land reserved for the road had been surrendered to the state authorities, and, the state authorities have agreed to reduce the width of the road. Finally, the plaintiff contends that the boundary stones were not in place when the survey was conducted by the 1st and 2nd defendants. On the basis of those allegations,

the plaintiff prays for a declaration that the partition of MG127 Lot 813 Mukim Sri Gading was null and void, and for a declaration that the 1st and 2nd defendants could not demolish the shophouse of the plaintiff. But pertinently, there is no challenge to the propriety or legality of the judgment, and without such a challenge, with respect, there is not a hope in the world that the judgment would be set aside or that execution upon that judgment could be resisted.

There is this cross-claim, but a cross-claim is no reason to stay execution upon a conclusive judgment. This could be seen in the case of *Ferdinand Wagner v. Laubscher Bros & Co* [1970] 2 QB 313. In *Wagner*, the plaintiff obtained a conclusive judgment in Germany against the defendant, and registered that judgment in England. By reason of s. 2(2) of the English Foreign Judgments (Reciprocal Enforcement) Act 1933, on registration, the German judgment became of the same force and effect as if it had been given by the High Court in England. The defendant applied to stay execution upon the judgment, upon the ground that they have a claim against the defendant. Both the master and judge on appeal granted the stay. However the Court of Appeal held that a stay should not be granted simply because the defendant had brought a cross-claim in another action against the plaintiff. At p. 317, Lord Denning said:

> Here is a judgment which is equivalent to an English judgment. If the plaintiff had obtained an English judgment, we should not, for one moment, grant a stay simply because the defendants had brought a cross-claim in another action against the plaintiff. So here we should not stay execution in this German judgment simply because Laubscher's have brought a cross-action in England against Wagner.

The same view was echoed by Phillimore LJ who said, at p. 320, as follows:

> This judgment was not obtained by default or anything of the sort: it was obtained by a succession of hearings before the superior courts of another country which is party to this reciprocal enforcement of judgments Act.
>
> If such a judgment had been obtained in the courts of this country, it is very difficult to think that a judge of the High Court here would have stayed its execution simply on the ground that the respondent here say they have got some sort of counterclaim which they should have put forward before but which they now really want to pursue.

That a court should not interfere with lawful execution upon a judgment was also the message in *Strandmill Ltd v. Epping Forest District Council* (Court

of Appeal (Civil Division) 6 July 1989) and *Eren v. Tranmae* (Court of Appeal (Civil Division) 17 March 1994).

There is direct authority that an injunction cannot be granted to restrain execution upon a conclusive judgment obtained in another action. In *Liew Ah Hock v. Malayan Railway* [1967] 1 MLJ 53, where the facts are almost identical to the present application, the plaintiff claimed for an injunction "to restrain the defendant by itself, its servants or agents from proceeding with the execution of the judgment against the plaintiff in Civil Suit No 1759 of 1960 or otherwise from obstructing or interfering with the plaintiff's enjoyment of the said land"; the defendant had obtained a valid subsisting judgment against the plaintiff for possession of the land in question. There it was submitted that the action was not maintainable in law on the ground that there is no precedent for asking a court to grant an injunction against the execution of its own judgment especially in the circumstances prevailing since the fusion of law and equity in 1878. And agreeing with the latter submission, Winslow J held as follows.

> Reliance was placed on the decision in *Wright v. Redgrave* (1879 11 Ch D 24) in which it was held that on the principle that there should never be conflicting proceedings going on at the same time in two branches of the court an injunction to restrain proceedings in one branch would be refused on an action being brought in another.
>
> There is already a valid subsisting judgment in favour of the defendant for possession against the plaintiff of the land in question. That was a judgment of the High Court in Civil Suit No. 1759 of 1960, and in the execution of that judgment, the defendant has issued a writ of possession against the plaintiff. I am being asked, in effect, to grant an injunction to restrain such execution in the current action.
>
> I am of the opinion that I would no more be justified in entertaining such an application than Mulins V.C. was in *Wright v. Redgrave* above where his grant of such an injunction was reversed by the Court of Appeal for the reason I have already stated.

Similarly, this court is being asked to grant an injunction to restrain execution of a valid subsisting judgment, a judgment that is both final and conclusive. With respect, injunction is preventive relief. " ... the court ... has power to act by way of declaration or injunction to restrain an act which would not be lawful" (*Mitchell and Another v. Carter and another, Buckingham International Plc* [1977] 1 BCLC 673 per Aldous LJ). The purpose of an injunction is protection (*Speed Seal Products Ltd v. Paddington and Anor* [1985] 1 WLR

1327; *Maastricht Referendum Campaign v. Hounan and Ors*, Chancery Division 28 May 1993), " ... is to protect a person from some infringement of his rights which he reasonably apprehends" (*Microsoft Corporation v. Plato Technology Ltd*, Court of Appeal (Civil Division) 15 July 1999 per Nourse LJ), to prevent a repetition of a wrong act (*Coflexip SA and Anor v. Stolt Comex Seaway MS Ltd And Ors* [1999] 1 All ER 593). An injunction is an instrument of protection (*ICI Australia Operations Pty Ltd v. Trade Practices Commission* 110 ALR 47) against unlawful acts. Execution of a judgment is a lawful act. The court cannot restrain a lawful act. An applicant for preventive relief must show that his legal rights had been or would be infringed. An applicant must establish that he has a good arguable claim to the right he seeks to protect (*American Cyanamid v. Ethicon Ltd* [1975] AC 396, [1915] 1 All ER 504 HL), or that there is a serious issue to be tried (besides *American Cyanamid*, see also *New England Reinsurrance Corporation and First State Insurance Co v. Messoghios Insurance Co SA* [1992] 2 Lloyd's Rep 251, where the English Court of Appeal applied the test of "good arguable case" as meaning "a serious issue to be tried", and *Tribune Investment Trust Inc v. Soosan Trading Co Ltd* [2000] 3 SLR 405, where Yong Pung How CJ stated that the plaintiff must show an arguable case or a serious issue to be tried).

Now, it is a principle to be applied in all applications for interlocutory injunctions that a court must not attempt to decide the claim on the affidavits; it is enough if the applicant shows that there is a serious issue to be tried (*American Cyanamid*). " ... the judge should not (deal) with the application in such a manner as to give the impression in his judgment that he had in fact disposed of the (main action) on its merits based on the affidavits of the parties to the application. It is necessary to bear in mind in an application for an interim injunction that the court is not called upon to make any final decision on any question of fact. What is relevant and required at that stage is for the learned judge to decide on the affidavits before him that the claim ... is not frivolous or vexatious; in other words, that there is a serious question to be tried ... (*Tien Ik Sdn Bhd v. Kuok Khoon Hwong Peter* [1992] 2 MLJ 689, 700 per Jemuri Serjan CJ; see also *Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd* [1985] 1 MLJ 132, *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150, and *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299, where the Supreme Court and Court of Appeal respectively equated "no serious issue to be tried" as "frivolous and vexatious"). "At an interlocutory proceeding for an injunction, the court is not called upon nor is it desirable for the court to decide finally on the right of the parties but the court must be satisfied that there is a serious issue to be tried. The court is

not justified in embarking upon anything resembling the trial of the action upon conflicting affidavits nor to evaluate the strength of either party's case" (*Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461, 485 per Jemuri Serjan CJ). "(The judge) must ask himself whether the totality of the facts presented before the him discloses a *bona fide* serious question to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies the issue raised on joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is the end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of the inquiry" (*Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 CLJ 293, per Gopal Sri Ram JCA). Nonetheless, "the prospect of the plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against the prospects of failure. All that has to be seen is whether the plaintiff has prospects of success, which, in substance and reality, exists" (*Mothercare Ltd v. Robson Books Ltd* [1979] FSR 466, 474 per Sir Megarry VC, and quoted with approval, by Haidar J, as he then was, in *Kunathasan Chelliah & Anor v. Tan Yak Buang & Ors* [1996] MLJU 528). But "it is important to bear in mind that the *American Cyanamid* case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunction when it is just and convenient to do so. The *American Cyanamid* case is no more than a set of useful guidelines which apply in many cases. It must never be used as rule of thumb, let alone as a strait-jacket" (*Cambridge Nutrition Ltd v. British Broadcasting Corp* [1990] 3 All ER 523 per Kerr LJ). "There may be other special factors to be taken into consideration in the particular circumstances of individual cases" (*American Cyanamid* at p. 409), and Lord Diplock's speech should not be read "as intended to fetter the broad discretion conferred on the courts ... " (*Regina v. Secretary Of State For Transport ex parte Factortame Ltd And Ors (No 2)* [1991] 1 AC 603 per Lord Goff of Chieveley delivering the majority opinion). " ... there may be special factors which can affect the balance of convenience approach which gives the courts flexibility in deciding whether or not to grant or withhold injunctions" (*Concorde Construction Co Ltd v. Colgan Co Ltd* 29 Build LR 120 per Rhind J; see also *Smith v. Inner London Education Authority* [1978] 1 All ER 411, "*Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] l MLJ 323, where it was held by Edgar Joseph Jr J as he then was, that the wide public interest in ensuring the safety

of adjoining houses was a decisive factor, *Saw Seng Kee v. Director of Lands & Mines, Penang & Ors* [1987] 1 MLJ 80, where it was held by Edgar Joseph Jr J that a special case concerns actions against public authorities who should not be restrained by interlocutory injunction from exercising its statutory powers unless the applicant has shown a real prospect of success in his claim for a permanent injunction at the final trial, *The Governors & Trustees of Lady Templar Tuberculosis Hospital Fund Registered v. Rampai Muda Development Sdn Bhd* [1987] 2 MLJ 494, where it was held by LC Vohrah J that the financial inability of one party to run the hospital providing an essential social service was a special factor, *Lim Kit Siang v. United Engineers (M) Bhd & Ors* [1988] 1 MLJ 35, where it was again held by Edgar Joseph Jr J that actions against public authorities should be treated as a special case). Special factors would take a case out of the general rule that it is not necessary for an applicant for an interlocutory injunction to make out a *prima facie* case (see majority decision, Lord Denning dissenting, in *Hubbard And Ors v. Pitt And Ors* [1976] QB 142; see also *Smith v. Inner London Education Authority (supra)* at 418 [1978] 1 All ER 411, *Saw Seng Kee v. Director of Lands & Mines, Penang & Ors*), and *Abdul Ghapur Hj Salleh v. Tun Datuk Hj Mohamed Adnan Robert Yang Di-Pertua Negeri Sabah & 7 Ors* [1987] 2 MLJ 724, 731).

The following authorites say that one other test to determine if there is a serious question to be tried, is to evaluate if there is a justiciable or reasonable cause of action.

Going by the reported authorities, the principles to be applied in applications for injunctions as explained in *American Cyanamid* were first applied in Malaysia, in *Datuk Syed Kechik Syed Mohamed v. Datuk Yeh Pao Tzu & Ors* [1977] 1 MLJ 56, a decision delivered on 9 September 1975, where it quickly recognised by Yusoff J, as he then was, "that the principle of law governing applications for interlocutory injunction laid down in *Stratford v. Lindley* [1965] AC 269 has been superseded by the recent decision of the House of Lords in *American Cyanamid Co v. Ethicon* [1975] 1 All ER 504", and "the question is no longer whether the plaintiff has made out a *prima facie* case, but whether there is a serious question it be tried".

The principles were next applied, on 15 October 1975, in *Seet Soh Ngoh v. Venkateswara Sdn Bhd & Anor* [1976] 1 MLJ 242, where it was held by Chang Min Tat J, as he then was, that there were special factors in the case before him "within the ambit of Lord Diplock's speech in the *American Cyanamid* case", and on 4 November 1976, in *Mohamed Zainuddin bin Puteh v. Yap Chee Seng* [1978] 1 MLJ 40, where it was held by Hashim Yeop

Sani J, as he then was, that the approach guided by the apparent strength of the plaintiff's case as disclosed in its affidavit "has now been abolished by the House of Lords in the *American Cyanamid* case, and that new principles have been set out in the following sequence. First to discover whether the plaintiff's case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are even it may not be improper for the court to take into account any tipping in the balance as revealed by affidavits" (his Lordship would express an identical opinion in *Evercrisp Snack Products (M) Sdn Bhd v. Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297).

The principles were first applied by the Federal Court, on 23 October 1978, in *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150, where Abdoolcader J, as he then was, abridged those principles as follows:

> I think the basic principles in *American Cyanamid* ... can be aptly put thus: In order to grant a interlocutory injunction, the court does not have to be satisfied that if the case went to trial on no other evidence than is before the court on the hearing of the application for interlocutory relief, the plaintiff would be entitled to a permanent injunction on the same terms as that sought in the interlocutory proceedings. Where damages would be an adequate remedy no interlocutory injunctions would normally be granted, but if there is a doubt as to the adequacy of damages, the question or balance of convenience arises, and although it might not be proper to take into account, as one of the many varying factors relevant to this question, the relative strength of each party's case, this should he done only on the basis of facts disclosed by the affidavit evidence as to which there is no credible dispute, without embarking on anything resembling a trial of the action. When an interlocutory injunction is sought, the balance of convenience will be the overriding consideration.

Then shortly thereafter, on 6 December 1978, in *Majlis Perbandaran Pulau Pinang v. Boey Siew Than & Ors* [1979] 2 MLJ 127, the Federal Court, per Abdoolcader J, as he then was, enunciated further, as follows:

> In order for the appellants to be entitled to interlocutory relief, it is necessary for the court to be satisfied that there are serious questions to be tried in the sense explained by the House of Lords in *American Cyanamid* ... . These no doubt will vary from case to case. If the court is satisfied that there are serious and difficult questions of fact or law involved in the proceedings, it will not undertake a preliminary trial of the action in order to forecast a probable result, but if the appellants have a real prospect of ultimate success, it will then proceed to consider the balance of convenience *viz*, whether the inconvenience or injury which the appellants will be likely to suffer if an injunction is refused outweighs or is outweighed by, the injury which the respondents will suffer if an injunction is granted. These two issues are distinct and separate and the court must so consider them.

A similar opinion was expressed by the Privy Council, on 4 April 1979, in *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212, who opined:

> The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a 'probability', a '*prima facie*' case or a 'strong *prima facie* case' that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried. *American Cyanamid v. Ethicon* [1975] AC 396.

But the Federal Court soon applied the test of "no cause of action" as meaning "no serious issue to be tried", for it was held on 27 April 1979, in *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 2 MLJ 240 per Abdoolcader J, as he then was, that "the order of 5 August 1977 should not have been granted as the respondent had no right in the circumstances to the temporary injunction sought by him as, if there is no cause of action against the appellant, there can be no serious question to be tried between them ..." .

And the "cause of action" test was adopted again by the Supreme Court in *Utusan Melayu (Malaysia) Berhad & Anor v. Chan Tse Yuen* [1989] 1 CLJ 149; [1989] 1 CLJ (Rep) 163 (where it was held that as the plaintiff-respondent had failed to identify any legal right sufficient to give rise to a justiciable cause of action either in his originating summons or in his application in support of his *ex parte* summons-in-chambers, there was really nothing to be protected by the interlocutory injunction) (a decision followed by the High Court in *Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors* [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745, and *Lim Chong Construction Co Sdn Bhd v. Silam Quarry Sdn Bhd* [1990] 1 CLJ 1158; [1990] 2 CLJ (Rep) 374), and in *RCA Sdn Bhd v Pekerja-perkerja RCA Sdn Bhd & Ors* [1991] 1 CLJ 19; [1991] 1 CLJ (Rep) 401 (where it was held that as there was no cause of action before the court, there was no *status quo* to be preserved).

Indeed, in *Lim Chong Construction Co Sdn Bhd v. Silam Quarry Sdn Bhd (supra)*, Zakaria Yatim J, as he then was, pointedly said that the "grant or refusal of an interlocutory injunction ... depends on whether, there is a cause of action" and that since the general indorsement does not disclose any reasonable cause of action there is no serious question to be tried. A similar view was also expressed by the High Court in *Sarkawi bin Sadijo v. BMG Music (M) Sdn Bhd & Ors* [1996] 4 MLJ 515 (where Abdul Malik Ishak J

stated, "I venture to say that implicit in the phrase 'a serious question to be tried' the applicant must show that he has a valid cause of action"), *Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd* [1998] 6 MLJ 136 (where RK Nathan J held, "It is trite that any application for an injunction requires the existence of a cause of action. The mere fact that a party can apply for an injunction is in itself not a cause of action"), and, *Kanawagi Seperumaniam v. Penang Port Authority* [2001] 5 MLJ 433 (where Faiza Tamby Chik J held, "it is well established law that an interlocutory injunction is ancillary to a cause of action and therefore it is only a party who has a cause of action who can apply for an interlocutory injunction").

And on one occasion at least, the Court of Appeal expressed a similar view, in *Lee Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Ors* [2000] 3 CLJ 473, where Mokhtar Sidin JCA stated, "This raised the question of the cause of action when an injunction is sought".

In any event, whichever the case, it can still be safely said that the plaintiff has not shown, that the intended execution of the judgment would infringe his legal rights, that he has a reasonable cause of action, that there is a serious issue to be tried, or that he has a good arguable claim to the right he seeks to protect. In the first place, it is beyond doubt that the 1st and 2nd defendants have the right conferred by a valid and subsisting judgment to enforce the judgment. " ... the court should not ... interfere with what would ... be a legitimate approach to the seat of justice" (*Bryanston Finance Ltd v. De Vries (No 2)* [1976] 1 All ER 25, per Buckley LJ). An injunction restraining execution upon a judgment obtained in another court, if available before the Judicature Acts (*In Re Thorpe ex p Hartel* 8 Ch D 743; *In Re London Cotton Company* 2 Eq 53), is no longer available after the Judicature Acts (*Birmingham Estates Company v. Smith* 13 Ch D 506; see also *Liew Ah Hock v. Malayan Railway*). There can only be an application to the court, where the judgment is, to stay the judgment (see *Birmingham Estates Company v. Smith (supra)*, 508). But given that the validity and finality of the judgment in the present case is beyond question, there can be no question of a stay of execution, and a *fortiori*, the court should not deny the 1st and 2nd defendants of the fruits of their litigation. "In an ordinary case, the purpose of an interlocutory injunction is clear: to 'hold the ring', or preserve, as best the court may, the position of both parties until their right or obligations are established at trial; see *American Cyanamid Co v. Ethicon* [1975] AC 396, 406D-F and *Reg v. Secretary of State for Transport, ex parte Factortame Ltd* [1990] 2 AC 85" (*Regina v. Secretary of State for Transport., ex parte Factortame Ltd And Ors (No 2)* [1991] 1 AC 603). "The purpose of an

interlocutory injunction is to preserve matters in *status quo* until the case can be tried" (*Perumahan Farlim (PG) Sdn Bhd & Ors v. Cheng Han Guan & Ors* [1989] 2 CLJ 967; [1989] 1 CLJ (Rep) 127 per Lee Hun Hoe CJ). But no question of holding the rights can possibly arise in the present case, for all rights had been conclusively adjudicated and determined. This is not an application for an interlocutory injunction to restrain the 1st and 2nd defendants from doing acts alleged to be a violation of the plaintiff's legal right, but to restrain the 1st and 2nd defendants from exercising their irrefragable right to enforce the judgment, which right must be a special factor within the ambit of Lord Diplock's speech. This application is a misuse of the court machinery and is an abuse of process (see *Badaiddin*). There is only reason and already more than enough to dismiss this application.

Still, it could be said that with regard to the action itself, that the statement of claim merely raised matters which could and should have been litigated in 72-856-1995. But it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. "The *locus classicus* of that aspect of *res judicata* is the judgment of Lord Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100, 115, where the judge says: ' ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under certain circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. This plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time'" (*Carl Zeiss Stiftung v. Rayner & Keeler Ltd & Ors* [1976] 1 AC 853, 935. There are three exceptions to the rule in *Henderson v. Henderson*, *viz*, (1) where the plaintiff was unaware of the circumstances of the claim, (ii) where an agreement was made between the parties holding the action in abeyance and (iii) where the plaintiff had not brought his case earlier in reliance upon a representation by the defendant (see *Talbot v. Berkshire County Council* [1994] QB 290). But there are no facts, not even on an alleged basis, for those exceptions to apply. Rather, the statement of claim itself (see para. 7) reveals that the plaintiff was aware of the circumstances surrounding the partition of MG 127 Lot 813 Mukim Sri Gading in 1978. Indeed, the order of court

(see encl. 4 exh. LY8) exhibited by the plaintiff, says that the plaintiff was the 3rd respondent in that application to court for partition, and that the plaintiff was present when the court ordered the partition of MG 127 Lot 813 Mukim Sri Gading. In both his statement of claim and his affidavit in support of his application for the injunction, the plaintiff contends that he had opposed the application for partition of MG 127 Lot 813 Mukim Sri Gading. But this means, that the present action is a brazen attempt by the plaintiff, who failed in High Court at Muar Originating Summons No. 279 of 1977 to resist the partition, to re-open, after a passage of 25 years, the subject of the partition of the said land that had been adjudicated years ago by a court of competent jurisdiction. The plaintiff contends that the partition of MG 127 Lot 813 Mukim Sri Gading into three lots was null and void by reason of some alleged breach of the Malay Reservation Act and also by reason that the land acreage of Lot 10767 is less than one acre. But those issues belonged to High Court at Muar Originating Summons No. 279 of 1977, and should have been brought up in that proceeding. The Plaintiff cannot be permitted now to re-open the subject of the partition of MG 127 Lot 813 Mukim Sri Gading. In para. 6 of his affidavit in support of this application for the injunction, the plaintiff affirms that he attempted, when he applied for leave to appeal to the Court of Appeal, to raise as fresh issues the issues that form the basis of this application, but that his application was rejected by a panel of three judges, on the ground that those issues were not raised in the court below. And in para. 7 of his affidavit in support of this application for the injunction, the plaintiff affirms that he was advised that his "appeal" had reached an end beyond which there is no appeal. Yet even so, the plaintiff has instituted this collateral action to challenge the partition ordered by the High Court at Muar in Originating Summons No. 279 of 1977, and to challenge the final judgment obtained in 72-856-1995 and affirmed on appeal. But it is an abuse of process to initiate proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision which had been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had had a full opportunity of contesting the decision of the court by which it was made (*Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529, 541; *Reichel v. Magrath* [1889] 14 App Cas 665 and *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529 "are authority for the proposition that where an issue has been fully litigated in a case, whether civil or criminal, it is an abuse to attempt to re-open it in subsequent litigation. This is simply the well known and accepted principle of *res judicata*" (*Business Software Alliance & Ors v. SM Summit Holdings Ltd & Anor and Other*

Appeals [2000] 2 SLR 733 per LP Thean JA). Relitigation of an issue which had previously been the subject of a final decision "must *prima facie* be an abuse of the privilege of the court" (*McIkenny v. Chief Constable of the West Midlands* [1980] QB 283, 333 per Lord Goff). The present action is all that.

And most probably, the purity of purpose is suspect as well, for it would certainly appear that this action is for a collateral purpose on the part of the plaintiff, other than the pursuit of his remedy at law. It has been said, that on 6 February 2002 the Batu Pahat Magistrate's court had authorised the 1st and 2nd defendants and or the bailiff of the court to use such reasonable force as may be necessary to enter and to demolish that part of the shophouse of the plaintiff standing on the land of the 1st and 2nd defendants, and that on 16 April 2002 the Court of Appeal had dismissed the plaintiff's application for leave to appeal. As for the events that followed, the uncontroverted affidavit (encl. 6) filed by the 1st and 2nd defendants (encl. 6) in opposition to this application for injunction discloses the following, and they are not edifying. On 17 April 2002, ie, a day after the plaintiff's application for leave to appeal was dismissed, the 1st and 2nd defendants attempted, with the assistance of the bailiff of the court and the police, to execute the judgment. That morning, before the arrival of the bailiff and police at the premises in question, the plaintiff's son, one Du Gen Yom @ Low Gen You, abused and assaulted the manager of the 3rd defendant who later reported the assault on him to the police. A large crowd had gathered inside and outside the premises in question when the bailiff arrived at about 10am. Also present were the 1st defendant, Mr Tan Kok Kwang, and Mr Mohd Ashri bin Rais, counsel for the plaintiff in Batu Pahat 72-856-1995 and in High Court at Muar Civil Appeal 11-20-2001 and in the present action. Tan Cheng Kwang, a representative of a political party, verbally abused the 1st defendant and Mr Tan Kok Kwang, There were many iron hoes in the premises. For about two to four hours, the bailiff with the assistance of Inspector Halim, attempted but failed to advise the plaintiff and his sons, in particular the said Du Gen Yom @ Low Gen You, not to obstruct the execution proceedings. Mr Mohd Ashri and Tan Cheng Kwang produced LY14 (the letter of the Pejabat Tanah agreeing to the width of the road being reduced to 40') as reason for their opposition to the execution proceedings. Mr Tan Kok Kwang advised Mr Mohd Ashri that LY14 had no bearing on the execution proceedings, and that he (Mohd Ashri) would be cited also for contempt if he should obstruct the execution proceedings. Inspector Halim proposed a peaceful resolution. With the agreement of Mr Tan Kok Kwang

and Mr Mohd Ashri, Inspector Halim requested all parties to meet at the Parit Raja Police Station at 1pm. But Mr Mohd Ashri did not keep the appointment. When he was contacted on the telephone at 1.45pm, Mr Mohd Ashri said that he had mistakenly proceeded to the Batu Pahat Police Station, but that he would proceed to the Parit Raja Police Station. It would have taken only a few minutes to travel between the police stations and the plaintiff's premises. But even at 2.30pm, Mr Mohd Rais and/or the plaintiff had not arrived at the Parit Raja Police Station. All who had waited at the Parit Raja Police Station and who had missed their lunch, "diperbodohkan oleh" Mr Mohd Ashri. At 2.30pm, Inspector Halim, Mr Tan Kok Kwang and the 1st defendant returned to the plaintiff's premises. At the plaintiff's premises were Mr Mohd Ashri and the plaintiff and his children. "Ini telah mengesahkan kami telah semua telah diperbodohkan dan dipermainkan oleh plaintiff and peguamcaranya". The 1st defendant believed that it was all done by the plaintiff and his solicitor "untuk melengkahkan masa dan menafikan perjalanan perlaksanaan writ permilikan pada 17 April 2002". At 3pm, the 1st defendant and his employees wanted to move (mengalihkan) the moveable property of the plaintiff. But before they could do so, three sons of the plaintiff and Tan Cheng Kuang who had baseball bats in their hands threatened to attack anyone who would touch the property of the plaintiff. Inspector Halim tried to calm the tense situation. Inspector Halim advised the sons of the plaintiff not to cause an untoward incident.

Then with the agreement of Mr Tan Kok Kwang and Mr Mohd Ashri, all parties agreed to meet at the Parit Raja Police Station, to find a solution for the plaintiff to deliver vacant possession. It was also agreed that Teh Seng Hoe, a land surveyor, and his assistants, would be permitted to mark out that part of the premises to he demolished. Between 3.30pm to 4.30pm, all parties were at the Parit Raja Police Station's conference room.

The plaintiff asked for a grace period of ten days to deliver vacant possession. The 1st defendant agreed to that request. The bailiff informed the learned magistrate that parties wish to record a consent order.

At 6pm, Mr Tan Kok Kwang and Mr Mohd Ashri attended before the learned magistrate who recorded (see exh. T2) the following consent order:

DI DALAM MAHKAMAH MAJISTRET DI BATU PAHAT DI DALAM NEGERI JOHOR, MALAYSIA SAMAN NO. 72-856-2001 (NO. PELAKSANAAN: 76-65-2001)

ANTARA

1) TOR LEN RUA

2) POH AH TEE @ POUR LONG CHIN ... PLAINTIF-PLAINTIF

DAN

LOA YIN KAW @ LOO AH BAH ... DEFENDAN

DI HADAPAN TUAN AZMAN BIN MUSTAPHA, MAJISTRET, MAHKAMAH MAJISTRET, BATU PAHAT, JOHOR DI DALAM KAMAR PADA 17HB. APRIL, 2002

PERINTAH

TINDAKAN INI setelah dipanggil untuk sebutan pada hari ini DENGAN KEHADIRAN Encik Tan Kok Kwang sebagai Peguamcara Plaintif-plaintif dan Encik Mohd. Ashri Rais sebagai Peguambela Defendan DAN SETELAH MENDENGAR kedua-dua Peguambela MAKA DENGAN PERSETUJUAN ADALAH DIPERINTAHKAN bahawa:

1) Tarikh perlaksanaan Writ Pemilikan dalam tindakan ini adalah ditangguhkan daripada 17.4.2002 kepada 30.4.2002;

2) Defendan bersetuju untuk mengosongkan premis No. LC 98, Jalan Besar, Parit Raja, Batu Pahat, Johor pada atau sebelum 28.4.2002;

3) plaintif-plaintif dibenarkan merobohkan bahagian premis tersebut yang menceroboh dengan menggunakan jentolak selepas 28.4.2002; dan

4) Defendan memberi akujanji tidak akan menghalang pelaksanaan Writ Pemilikan yang dijalankan selepas 28.4.2002.

Bertarikh pada 17hb. April 2002.

MAJISTRET,
MAHKAMAH MAJISTRET,
BATU PAHAT.

But it appears that there was never ever any intention on the part of the plaintiff to keep good faith, for two days before the agreed dateline for delivery of vacant possession, the plaintiff filed the present action and application for an injunction to restrain the very same execution proceeding that he had given his undertaking not to obstruct. Nope, it would not appear that this is a *bona fide* application for protection. Established facts and circumstances say that this application has no merits, but is for a collateral purpose, and it is to deny the 1st and 2nd defendants of the hard won fruits of their litigation. The right and proper thing to do is to dismiss this application with costs.